LEGISLATIVE RESEARCH COMMISSION

LAWS OF EVIDENCE AND COMPARATIVE NEGLIGENCE

REPORT TO THE 1981 GENERAL ASSEMBLY OF NORTH CAROLINA

A limited number of copies of this report is available for distribution through the Legislative Library.

Room 2126, 2226
State Legislative Building
Raleigh, N. C. 27611

Phone: (919) 733-7778

STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

January 14, 1981

TO MEMBERS OF THE 1981 GENERAL ASSEMBLY:

The Legislative Research Commission herewith reports to the 1981 General Assembly on the laws of evidence and comparative negligence. The report is made pursuant to Resolution 65 (H.J.R. 1177) of the 1979 General Assembly.

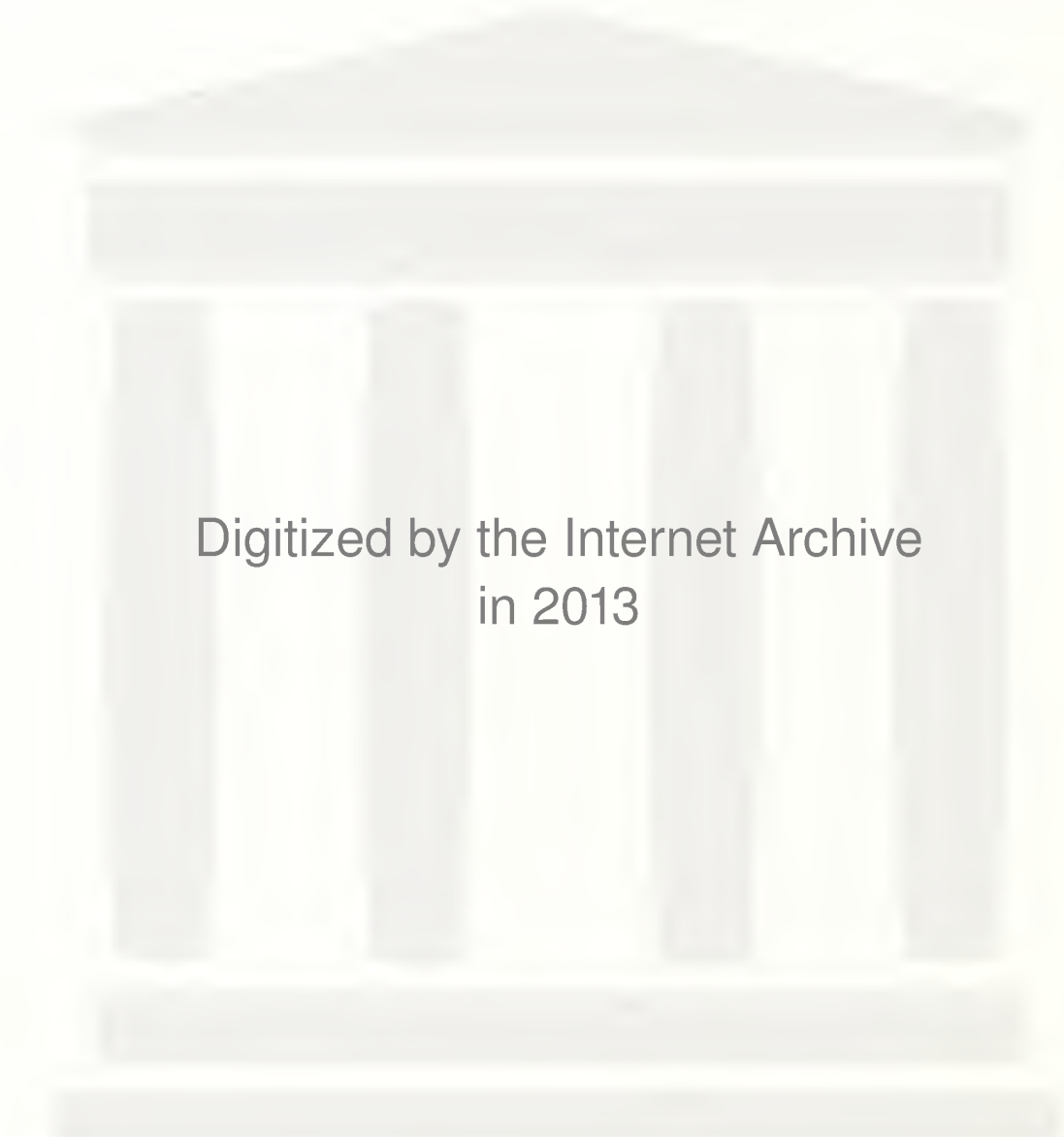
This report was prepared by the Legislative Research Commission's Study Committee on The Laws of Evidence and Comparative Negligence and is transmitted by the Legislative Research Commission for your consideration.

Respectfully submitted,

Carl J. Stewart, Jr. W. Craig Lawing

Cochairmen
Legislative Research Commission

TABLE OF CONTENTS



INTRODUCTION

The Legislative Research Commission, created by Article 6B of Chapter 120 of the General Statutes, is authorized pursuant to the direction of the General Assembly "to make or cause to be made such studies of the investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" and "to report to the General Assembly the results of the studies made," which reports "may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations." G.S. 120-30.17. The Commission is co-chaired by the Speaker of the House and the President Pro Tempore of the Senate and consists of five Representatives and five Senators, who are appointed respectively by the Co-Chairmen. G.S. 120-30.10(a).

At the direction of the 1979 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects which were grouped into broad categories. (See Appendix A for a list of the Commission members.) Pursuant to G.S. 120-30.10(b) and (c), the Commission Co-Chairmen appointed committees consisting of legislators and public members to conduct the studies. Each member of the Legislative Research Commission was delegated the responsibility of overseeing one group of studies and causing the findings and recommendations of the various committees to be reported to the Commission. In addition, one Senator and one Representative from each committee

were designated Co-Chairmen.

Resolution 65 (House Joint Resolution 1177) of the 1979 General Assembly (see Appendix B) authorized the Legislative Research Commission to study the laws of evidence and to direct its efforts toward a proposed evidence code for this State. Resolution 65 also authorized the Commission to undertake the items listed in the Committee Substitute for House Bill 821 (see Appendix C) (postponed indefinitely in the 1979 Session). These items consisted of: a study of the current negligence laws in North Carolina, a determination of the possible costs and effects of changing from the current system to a comparative negligence tort system, and a determination of what law should govern in negligence cases when both parties are to some extent negligent.

COMMITTEE ACTIVITIES

The Committee to Study the Laws of Evidence and Comparative Negligence (see Appendix D for a list of its members) has met ten times. The Committee heard speakers (see Appendix E for a list of these speakers) and devoted approximately half of its time to review and study North Carolina and Federal evidence laws and half of its time to consider contributory and comparative negligence laws.

The Committee wishes to acknowledge the valuable assistance of Professor Robert Byrd in its deliberations on comparative negligence issues and in drafting portions of this report.

EVIDENCE

As a starting point for its deliberations on evidence laws, the Committee examined the Federal Rules of Evidence, which were proposed by the Supreme Court and enacted by Congress in 1975. At least sixteen states have adopted evidence codes based in substantial part on the Federal Rules.

The Committee compared the Federal Rules with North Carolina law as established by case law and statutes. For the most part, the Committee found that the Federal Rules were consistent with North Carolina practice. In some instances, the Committee's view was that the Federal Rule was preferable to current North Carolina practice. In other instances the Committee's view was that current North Carolina practice was preferable and accordingly, the Committee modified or rewrote the Federal Rule.

The Committee has given tentative approval to rules in the following areas:

Article I - General Provisions
Article II - Judicial Notice
Article IV - Relevancy and Its Limits
Article VI - Witnesses
Article VII - Opinions and Expert Testimony
Article IX - Authentication and Identification
Article X - Contents of Writings, Recordings, and Photographs

Due to time constraints, the Committee has not yet considered Article III - Presumptions in Civil Actions and Proceedings, Article V - Privileges, Article VIII - Hearsay and Article XI - Miscellaneous Rules. Nor has the Committee approved a commentary to accompany the rules and conforming amendments to existing statutes.

Recommendation

The Study Committee recommends that the General Assembly authorize the Legislative Research Commission to continue to study the laws of evidence and to direct its efforts toward a proposed evidence code. A proposed resolution to this effect is included in Appendix F.

COMPARATIVE FAULT *

Basic Elements of Contributory and Comparative Negligence

Under the tort system now in effect in North Carolina an injured person can recover damages for his injuries only by showing that they were caused by the negligence of the person from whom he seeks to recover. Further, the contributory negligence of the injured person--that is, when his own negligence has contributed to cause the accident out of which his injuries arose--operates as a complete bar to all recovery by him. Thus when a motorist negligently runs down a pedestrian, the pedestrian may recover for all harm he sustained in the accident if his own negligence did not contribute to cause it. On the other hand, if both the motorist and the pedestrian were negligent in causing the accident, the pedestrian cannot recover anything for his injuries. Although the motorist's negligence has played an equal or greater part than the pedestrian's conduct in causing the accident, the entire loss falls upon the pedestrian. Even though everyone might agree that seventy to eighty per cent of the responsibility for the accident should be placed upon the motorist, the contributory negligence rule operates as a complete bar to any recovery by the pedestrian.

Under the comparative negligence doctrine, the injured person's own negligence does not operate as a total bar to recovery by him but instead operates to reduce his recovery for harm he has suffered to the extent that his own negligence has contributed to cause the harm. The distinguishing feature of comparative negligence is the apportionment of damages based upon the relative

* The recommended statute applies to types of fault in addition to negligence. The term "comparative negligence" is used for convenience to include all forms of fault to which the statute applies.

fault of the parties involved in an accident. Although under negligence law fault is the primary factor relied upon for allocation of accident losses, the role of the fault principle is modified by the contributory negligence rule under which the entire loss caused by their combined negligence is allocated to the plaintiff or the defendant. In contrast, under the comparative negligence rule each party would be responsible for that portion of the damages caused by his own fault.

Arguments For and Against Comparative Negligence

Arguments For:

Widespread dissatisfaction with contributory negligence has centered in its failure to meet effectively any of the three general objectives sought in a system for allocating accident losses: (1) compensation, (2) fairness, (3) deterrence.

The operation of the contributory negligence rule as a complete bar to recovery by the injured person has generally been regarded as harsh and unfair because it casts the entire loss upon him although the negligence of others has substantially contributed in causing it. General agreement exists that courts have utilized special devices, such as last clear chance, or special application of legal doctrine, such as risk description and proximate cause, primarily to mitigate against the harshness of the contributory negligence rule. However, because the effect of the contributory negligence rule is to permit full recovery or no recovery, use of these exceptions has the effect of shifting the entire loss to the person against whom recovery is sought. General agreement also exists that under the tort system now in effect the decisions of

both juries and insurance companies are to some extent influenced by a comparison of the relative fault of the parties to the accident. Although this practice may also serve to reduce the harshness of the contributory negligence bar, its existence outside the legal rule structure suggests obvious limitations upon, and possible uneveness in its application. By giving the practice a legal base through adoption of comparative negligence greater consistency of application can be achieved and more control can be exercised.

Fault is the dominant factor utilized under the negligence system in the allocation of accident losses. Comparative negligence permits full implementation of fault as a basis for loss distribution, a result which is not possible under the all or nothing-at-all approach of contributory negligence.

Reform of the negligence system may help to preserve the fault system for accident loss distribution by eliminating some of the shortcomings of the fault system identified by its critics.

Arguments Against:

Advocates of contributory negligence have argued that denial of recovery to one whose negligence has contributed to cause his injury is justified on grounds of policy and morality. They also argue that contributory negligence serves the important function of deterring negligent conduct. The major thrust of their argument, however, has focused upon practical difficulties which they believe will result from and be encountered in the operation of a system of comparative negligence. Comparative negligence will permit anyone injured in an accident to receive compensation and will necessarily increase the number of claims made and litigated.

Further, a sense of entitlement or expectancy may result and in turn generate a large number of both small and nuisance claims. Comparative negligence will discourage settlements and, for this reason, result in more litigation. These increases in the number of claims made and in the number of cases litigated will place a greater burden on the courts and will increase the costs of insurance.

Precise judgments about the relative fault of two or more parties involved in an accident are not possible and it is unrealistic to ask the jury to make such judgments. Submission of a case to the jury is more complex under comparative negligence and the complexities are increased substantially when several parties are involved in the litigation and become even more severe when counterclaims, third-party claims, etc. are asserted. Control of the jury is necessarily diminished.

Assessment of the Arguments:

Although resolution of the arguments related to fairness and morality depends largely upon subjective judgment, opposition on moral grounds to apportionment of accident losses on the basis of relative fault seems weak, particularly in view of the prominent role fault already assumes in the negligence system. Finally, whatever values may be achieved by barring plaintiff's recovery because of his own negligence seem to be offset by permitting the defendant to escape all liability for his negligence.

The argument that contributory negligence is more effective in achieving deterrence also lacks persuasiveness. Most observers doubt that tort law has any significant effect in deterring

negligent conduct. Even if the rules governing tort liability deter negligent conduct, the negative effect upon deterrence of relieving a negligent defendant of all liability under the contributory negligence rule is likely to be as great as any positive effect that is achieved in denying recovery to a negligent plaintiff.

The contentions that adoption of comparative negligence will increase litigation, discourage settlements, enhance the administrative burden on courts, and increase insurance costs are more difficult to assess. Specific empirical data is simply not available either to support or refute these contentions. The design and completion of studies to collect these data would be a mammouth undertaking and, should such a study be undertaken, it seems likely, because of the large number of variables affecting each factor, that any findings made would have to be fairly general.

Despite these shortcomings some basis for reaching a satisfactory resolution of these issues does exist. General studies have collected and analyzed data in other jurisdictions to determine the impact of comparative negligence in these areas. Two studies - one based upon three years' experience in Arkansas when pure comparative negligence was in effect (this study is found in Rosenberg, Comparative Negligence in Arkansas - A Before and After Survey, 13 ARK. L. REV. 89 (1959)) and the other based upon ten years experience in Arkansas when modified comparative negligence was in effect (this study is found in Note, Comparative Negligence - A Survey of the Arkansas Experience, 22 ARK. L. REV. 692 (1969)) examined the effect of adoption of comparative negligence

upon court administration. Both studies were based upon surveys of Arkansas lawyers and judges which solicited responses based upon their actual experience in handling negligence claims under a comparative negligence system. Both studies concluded that the adoption of comparative negligence did not drastically alter the size or quality of the court's burden in processing cases and that problems relating to court administration should be ruled out by legislatures in considering whether to adopt comparative negligence. In both studies a majority of lawyers indicated that: (1) they would accept some cases now that would have been rejected under contributory negligence; (2) a greater number of cases were settled under comparative negligence; (3) the incidence of requests for jury trials was the same under the two systems (judges agree); (4) the length of time required to try cases has not changed (judges agree); (5) the proportion of verdicts won by plaintiffs increased; (6) the size of verdicts for plaintiff was not changed (judges agree). In the initial study a majority of lawyers and 42% of judges indicated that the damage issue was more difficult under comparative negligence and a majority of lawyers indicated that the liability issue was also more difficult while a majority of the judges indicated it was easier. In the subsequent study, the judges found the damage issue not more difficult than under contributory negligence and the liability issue easier and only about 1/3 of the lawyers found these issues more difficult under comparative negligence.

The widespread adoption and retention of comparative negligence by jurisdictions in the United States suggest that the fears about

increased litigation, greater burden of court administration, and enlarged insurance costs may well be unfounded. Some form of comparative negligence has been adopted by over 30 states (see Appendix G) and in a number of federal compensation programs. Georgia has had a form of comparative negligence for a long time; Mississippi for 70 years, Arkansas for fifteen years, and Maine, Hawaii, Massachusetts, New Hampshire, and Vermont for a decade or longer. No state that has adopted comparative negligence has later abandoned it. Even without an empirical study of each state's experience, this situation strongly suggests that the problems projected by opponents of comparative negligence are not likely to materialize.

Both experience and empirical studies provide a reasonable basis for assessment of the contentions that urge the impracticability of comparing relative fault and of handling in a jury trial the complex issues it introduces. Both tasks apparently are being successfully accomplished in a large number of other states and the studies of the Arkansas experience, cited previously, indicated that neither lawyers nor judges there see substantial problems in this area. Finally, allocation of losses by comparison of relative fault, although not capable of exact precision, in all likelihood produces a fairer result than the all or nothing-at-all allocation that is made under the contributory negligence rule.

Types of Comparative Negligence

Several types of comparative negligence rules have been adopted. Under "pure" comparative negligence the injured person's contributory negligence, no matter how great it is, does not

preclude recovery by him; instead his recovery for the losses caused by his injury will be diminished to the extent that his fault has contributed to the injury. Under the so-called modified comparative negligence rule, the injured person's contributory negligence may under some circumstances still operate as a complete bar to recovery by him. Two major types of modified comparative negligence exists. Under one, damages are apportioned on the basis of relative fault only if the injured person's negligence is less than that of the other party. When his negligence is not less than the other party's, it constitutes a complete bar to any recovery by him. If the proportion of fault attributed to the injured person is 49%, he is entitled to recover 51% of the amount of losses caused by his injury. However, if the proportion of fault attributed to him is 50%, his contributory negligence bars all recovery by him. The other type of modified rule provides for apportionment of damages on the basis of relative fault if the injured person's negligence was no greater than the negligence of the other party. Under this type of rule the injured person is entitled to recover for his losses, subject to reduction to the extent of his fault, whether the proportion of fault attributed to him is 49% or 50%. On the other hand, if he is determined to be 51% at fault, all recovery by him is barred.

States Adopting Comparative Negligence

Pure comparative negligence has been adopted in a variety of federal compensation systems, in Puerto Rico, and in nine states (Mississippi, Rhode Island, Washington, Florida, New York, California,

Louisiana, Alaska and Michigan). Its adoption in Alaska, California, Florida and Michigan was by judicial decision. Fifteen states (Georgia, Arkansas, Maine, Hawaii, Massachusetts, Minnesota, Colorado, Idaho, Oregon, North Dakota, Oklahoma, Utah, Wyoming, Kansas, and Montana) have adopted the modified system under which a plaintiff's negligence operates as a complete bar to recovery unless his negligence is less than defendant's. Eight states (Wisconsin, New Hampshire, Connecticut, Nevada, New Jersey, Texas, and Pennsylvania) have adopted the modified system under which a plaintiff is barred from all recovery only when his negligence is greater than defendant's.

Although no definite trend exists in the adoption that favors one of the three systems over the others, eight of the nine adoptions of pure comparative negligence and six of the eight adoptions of the "greater than" modified system occurred in the 1970's. (See Appendix G.)

Committee Findings Concerning the Effects of Comparative Negligence Laws on Liability Insurance Costs

During its study, the Committee on Evidence and Comparative Negligence attempted to determine the effects of comparative negligence laws on liability insurance costs in states that had some form of comparative negligence.

A study examining the effect of adoption of comparative negligence upon claims frequency and insurance rates was published in 1960 (see Peck, Comparative Negligence and Automobile Liability Insurance, 58 MICH. L. REV. 689 (1960)). This study amassed insurance rates, accident statistics, and other relevant data for

states in which the contributory negligence rule applied and for seven states in which some form of comparative negligence was in effect. The investigator's basic conclusion was that he was unable to detect any impact that adoption of comparative negligence had upon increasing the frequency of claims made or producing higher insurance rates. His conclusions are set out below:

> "It is possible that comparative negligence has an effect upon insurance rates, but that effect cannot be detected with the data on hand and the techniques used. Even if this is true, however, some measure of its force has been obtained. Adoption of a comparative negligence rule, as shown by the Arkansas experience, would not have a catastrophic result upon the insurance rate structure of any state. Indeed, it would not have as much effect as rapid growth of population, increased urbanization, or change to a traffic program with the effective safety record of a neighboring state. Its effect, if any, would probably go undetected in the rates and statistics of the insurance industry."

To obtain more recent information, the Committee sent a questionnaire to the State Insurance Commissioners of the 35 states that had by statute or court decision adopted comparative negligence. The questionnaire (see Appendix H) asked whether any significant increase in insurance rates had resulted at the time of or subsequent to adoption of comparative negligence that was traceable to the use of comparative negligence rather than contributory negligence. The questionnaire also asked: "If data is not available as to the actual increase, what in the Commissioner's opinion had been the impact of comparative negligence on insurance premiums in the state".

Twenty-four states responded. (The complete responses are

attached to the April 4, 1980 minutes on file in the Committee Clerk's office.) Only one state, Alaska, indicated a significant increase - estimated at 5% - in insurance premiums resulting from the adoption of comparative negligence. Two states, Minnesota and Rhode Island, stated that no increase had resulted. Fifteen states responded that the actual increase in premiums as a result of comparative negligence could not be determined. The Commissioner or his representative in ten of these states - Mississippi, Utah, Idaho, South Dakota, Maine, Oregon, Wyoming, Colorado, Wisconsin, and Montana - was of the opinion that comparative negligence had no impact on insurance costs. In five of these states - Hawaii, California, North Dakota, Nevada, and Oklahoma - it was felt that a slight increase in insurance premiums had resulted. Six states - Georgia, Arkansas, Connecticut, Kansas, Michigan, and Vermont - indicated that they had no data upon which to base an estimate or opinion.

Also, the Committee contacted the major national insurance associations to determine whether they had figures or were aware of published studies on possible effects of comparative negligence laws on liability insurance costs. The following associations were contacted: Insurance Information Institute, Insurance Services Office, Alliance of American Insurers, American Insurance Association, and National Association of Independent Insurers. (See Appendix I for a complete list of associations contacted.)

The associations supplied the Committee with articles and memoranda which suggested a rise in insurance rates as a result of a change to a comparative negligence system. However, the associations were unable to supply any historical figures with respect to an actual increase in insurance rates attributable to

comparative negligence. Nor were any of the associations aware of any empirical studies comparing insurance rates before and after the adoption of a comparative negligence system.

Several of the memoranda supplied by the insurance associations point to a closed claim survey by the Insurance Services Office that compared actual settlements under pure comparative negligence in California with an estimate of what the settlements would have been under the old contributory negligence law. Richard J. Miles, Vice President - Claims, California Casualty Insurance Company, describes the survey as follows:

> "In the private passenger auto field, they broke claims down into bodily injury, property damage and uninsured motorist. The total number of files considered was 2,186 with 521 in bodily injury, 1,622 in property damage and 43 in uninsured motorist.
>
> In the bodily injury claims, they concluded that the change to comparative negligence increased the settlements by .041 or slightly over 4 per cent. In the property damage line, it increased by .046 or slightly over 4½ per cent. In the uninsured motorist line, where they had the smallest sampling, the increase was a gaudy 13 per cent. The increase for all private passenger auto claims was .048 per cent or almost 5 per cent."

Mr. Miles states that the "sampling was rather small and I hesitate to either confirm or deny the accuracy of their conclusions." It should also be noted that Insurance Services Office recommended before the completion of the claims analysis study that insurance companies adjust their rates to reflect a 5 per cent increase:

> "To obtain a measure of the effect of the change in negligence provisions on insurance losses and settlement expenses, ISO is conducting a quantitative claims

> analysis study of experience under the negligence rule. Recognizing the need to reflect the anticipated increased costs to insurers prior to the completion of this study, ISO has selected a 5% factor as a conservative estimate of the change from a contributory to a comparative negligence system in California." Copyright, 1975, Insurance Services Office.

Approval of insurance rates by the Department of Insurance is not required in California and apparently no data has been compiled to indicate the extent that companies increased rates in response to the Insurance Services Office recommendation.

According to the Deputy Director of the Division of Insurance of Alaska, the net effect of comparative negligence on insurance rates was a "5% increase based, apparently, on experience gained in California. Considering the considerable changes caused by other factors since that time, it is impossible to tell if actual experience is offset by the increase".

The Insurance Services Office, based on the California survey, recommended a 5% increase in rates when New York adopted a "pure" comparative negligence system in 1975. According to ISO, the increase had the concurrence of the New York State Insurance Department.

The Committee did receive information from the California Casualty Insurance Company which compared the amounts paid in the last full year before the adoption of comparative negligence in California with the amounts paid in the first full year after adoption. However, the Vice-President of California Casualty stated that "consumer awareness, claims consciousness, and inflation obviously impacted our number". No attempt was made to isolate the effect of comparative negligence from these other factors.

Conclusion:

A thorough search revealed no recent comprehensive, in-depth study on the actual experience of any state. The Committee did receive articles and memoranda from major insurance associations suggesting an increase in insurance premiums as a result of adoption of a comparative negligence system. However, the contention that rates would increase appears to be based primarily on the California study. The study was based on predicted settlement figures, rather than on actual rate changes.

The majority of the Insurance Commissioners responding to the Committee's questionnaire indicated that in their opinion comparative negligence had no effect on insurance premiums in their states. Commissioners in several other states indicated that they did not have any data upon which to base an estimate or opinion.

Thus, the Committee was unable to find any strong evidence to support the contention that insurance rates would increase substantially as the result of adoption of a comparative negligence system in North Carolina.

Recommended Legislation and Official Commentary

After reviewing the current North Carolina law of contributory negligence, studying the issues and possible effects of comparative negligence, and carefully considering arguments for and against enactment of a comparative fault statute in North Carolina, the Committee voted to recommend the following statute and official commentary to the 1981 General Assembly.

A BILL TO BE ENTITLED

AN ACT TO ADOPT A COMPARATIVE FAULT SYSTEM.

The General Assembly of North Carolina enacts:

Section 1. Article 43A of Chapter 1 of the General Statutes is rewritten to read:

"Article 43A

"Comparative Fault

§1-539.3. Comparative fault system established.--(a) In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, if not greater than the fault or the combined fault of the party or parties against whom recovery is sought, diminishes proportionately the amount awarded as compensatory damages for an injury, death, or harm to property attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrine, such as last clear chance. If the contributory fault chargeable to the claimant is greater than the fault or combined fault of the party or parties against whom recovery is sought, it shall constitute a complete bar to the claimant's recovery.

(b) 'Fault' includes acts or omissions that are in any measure negligent or constitute reckless, willful or wanton conduct toward the person or property of the actor or others, or that subjects a person to strict tort liability. This term also includes breach of warranty, unreasonable

assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis of liability and to contributory fault.

§1-539.4. Special verdict; judgment.--(a) In all actions involving fault of more than one party to the action, including third-party defendants, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating:

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, and third-party defendant. For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the percentage of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction for amounts paid under release agreements, and enter judgment against each party liable on the basis of the rules of joint-and-several liability. For purposes of contribution

the court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

§1-539.5. Set-off.--A claim and counterclaim shall be set-off, and only the difference between them is recoverable in the judgment. However, to the extent that either or both of the claims are covered by liability insurance, no set-off shall be applied. For purposes of this section, 'liability insurance' includes self-insurance or any other security device provided to comply with a compulsory insurance coverage statute or similar statutory requirement."

Sec. 2. G.S. 1B-2(1) is amended by adding at the end of that subdivision the following phrase:

"however, if liability is based upon acts or omissions that constitute fault as defined in G.S. 1-539.3, their relative degree of fault determined as provided in G.S. 1-539.4 shall be the basis for allocation;"

Sec. 3. This act shall become effective on January 1, 1982, and shall apply to causes of action arising on and after that date.

Official Commentary

Section 1-539.3

Subsection (a). Under prior law contributory negligence operated as a complete bar to recovery. Subsection (a) partially abolishes the contributory negligence rule and adopts modified comparative fault. A claimant to whom no fault is chargeable is entitled to full recovery as under prior law. The recovery of a claimant to whom 50% or less of total fault is chargeable is diminished by the percentage of fault attributable to him. A complete bar to recovery exists when a claimant's fault is greater than the fault or combined fault of the party or parties against whom recovery is sought.

The doctrine of last clear chance, recognized under prior law to alleviate the harshness of the complete bar of contributory negligence, is abolished. Circumstances relevant to it will now be considered in determining the relative fault of the parties.

The fault of all parties to the action, including plaintiffs, defendants, and third-party defendants, is considered in determining total fault and the percentage of fault attributable to each party. The fault of persons other than parties to the action, including those who have settled claims against them, whose fault may have contributed in causing the accident is not considered in determining total fault and the percentage of fault attributable to each party.

A claimant's right to recover is determined by comparison of his fault to the combined fault of all defendants, including third-party defendants. If the claimant's fault is greater than the combined fault of all defendants, his recovery is barred. In all other cases, his recovery is diminished by the percentage of fault attributable to him.

The language "any contributory fault chargeable to the claimant" includes not only his own faulty conduct but also the fault of other persons imputable or chargeable to him under law.

Subsection (b). This subsection, together with subsection (a) effects a number of changes in North Carolina law. Under prior law, when both fault and contributory fault existed, a claimant was either barred from all recovery or obtained a full recovery. For example, when liability was based upon negligence, a claimant's contributory fault or implied assumption of risk (when applicable) was a complete bar to recovery. Under the statute, a claimant's contributory fault or assumption of risk bars recovery only when greater fault is attributed to him. In other instances, their impact is to diminish damages to be recovered by the percentage of fault attributed to him. Under prior law, when recovery was based upon strict liability, a claimant's contributory fault was ignored and full recovery was allowed. Under the statute, a claimant's recovery will be diminished by the percentage of fault attributed to him. A similar change will result when liability is based upon recklessness or other conduct to which the defense of contributory negligence was held inapplicable under prior law. Although in these situations, when greater fault is attributed to a claimant, his recovery will be barred, the possibility that he could have recovered in these circumstances under prior law seems unlikely.

Various types of contributory fault bar recovery for breach of warranty under existing statutes. This subsection modifies this result so that a claimant's contributory fault, when not greater than that of defendants, operates to diminish but not to preclude recovery. The only effect of the subsection in this area, as in other areas in which contributory fault has been recognized as a defense, is to replace the contributory negligence rule with modified comparative fault. This statute does not apply to intentional tort actions.

Section 1-539.4

Subsection (a). Subsection (a) adopts a special verdict procedure to reduce the complexity of the case for the jury and to simplify the instructions to be used in submission of the case to the jury. For each claim the jury determines total damages and the percentage of fault attributable to each party to that claim. The judge uses these findings to determine the amount of the award. North Carolina already uses a limited special verdict practice.

Under this subsection only the parties to the action are considered in determining total fault and the percentage of fault attributable to each party. For this purpose, possible fault of persons who were involved in the accident but are not made parties is not considered. Because both plaintiff and defendant have incentive and means for bringing other persons into the action, the normal expectation is that all involved persons will be made parties to the action.

The subsection recognizes that the determination of relative fault will require in some cases that two or more persons be treated as a single party. This consideration would be applicable, for example, when an employee and his employer are both held liable and the employer's liability is based solely upon principles of vicarious liability.

Subsection (b). Subsection (b) provides that the trier of fact, in determining relative fault of the parties, shall consider not only the nature of a party's acts or omissions but also the extent to which those acts or omissions contributed to cause the injury for which recovery is sought.

Subsection (c). The amount of damages for which judgment is to be entered can be readily derived by mathmatical calculation from the findings of the trier of facts. This subsection provides that the calculation is to be made by the judge rather than the jury.

This subsection (c) also continues the existing North Carolina rule of joint and several liability of joint tortfeasors. Under it a claimant can recover the total amount of his judgment against any defendant who is liable. As under prior law, the most important effect of the rule is to place upon defendants, rather than the claimant, losses incident to insolvency or unavailability of other defendants.

Finally, subsection (c) establishes procedures for the determination of the ultimate liability of each defendant so as to permit each to discharge his liability and thereby eliminate the need for contribution proceedings. By fixing each defendant's share of the obligation, it also provides a basis for enforcement of contribution by a defendant who is compelled to pay more than his share.

Separate amendment to the Uniform Contribution Among Tort-Feasors Act provides that liability for contribution shall be based upon relative fault. A pro rata distribution based upon the number of defendants determined the amount of contribution liability under prior law.

Section 1-539.5

When two persons are indebted to each other, a set-off is frequently applied to discharge both obligations in the amount of the smaller debt. The only payment made is the amount of the excess of the larger debt. In most circumstances, the set-off avoids a meaningless exchange of payments and also promotes fairness when one of the parties is insolvent. When the parties are covered by liability insurance, however, the set-off principle operates to deprive one party of all recovery and to reduce the recovery of the other party and in both instances an insurer realizes the resulting benefit. Such a result undercuts State policy making liability insurance compulsory in some areas and also undermines a basic purpose of adoption of a comparative fault system. For these reasons, this section precludes application of set-offs to reduce an insurer's liability under a liability insurance policy.

APPENDICES

Appendix A

Membership of Legislative Research Commission

House Speaker Carl J. Stewart, Jr. Cochairman	Senate President Pro Tempore W. Craig Lawing, Cochairman
Representative Chris S. Barker, Jr.	Senator Henson P. Barnes
Representative John Gamble	Senator Melvin R. Daniels, Jr.
Representative Parks Helms	Senator Carolyn Mathis
Representative John J. Hunt	Senator R. C. Soles, Jr.
Representative Lura S. Tally	Senator Charles E. Vickery

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1979
RATIFIED BILL

RESOLUTION 65

HOUSE JOINT RESOLUTION 1177

A JOINT RESOLUTION AUTHORIZING THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE LAWS OF EVIDENCE AND COMPARATIVE NEGLIGENCE IN THIS STATE.

Be it resolved by the House of Representatives, the Senate concurring:

Section 1. The Legislative Research Commission is authorized to study the law of evidence and to direct its efforts toward a proposed Evidence Code for this State. The Commission is also authorized to undertake the items listed in Section 2 of the Committee Substitute for H.B. 821, which was adopted on May 24, 1979. The Commission is authorized to report its findings and recommendations to the 1981 General Assembly.

Sec. 2. The study committee shall be composed of the following eleven members:

(a) five members to be appointed by the President Pro Tempore, of which four are trial lawyers, and of which one is not an attorney;

(b) five members to be appointed by the Speaker of the House, of which four are trial lawyers, and of which one is not an attorney; and

(c) one member from the staff of the Attorney General to be appointed by the Attorney General of North Carolina.

Sec. 3. This resolution is effective upon ratification.

In the General Assembly read three times and ratified, this the 8th day of June, 1979.

JAMES C. GREEN

James C. Green

President of the Senate

CARL J. STEWART, JR.

Carl J. Stewart, Jr.

Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1979

H 2

HOUSE BILL 821
Committee Substitute Adopted 5/24/79

Short Title: Comparative Negligence. (Public)

Sponsors: Representative

Referred to: Judiciary III.

March 15, 1979

A BILL TO BE ENTITLED

AN ACT TO CREATE THE COMPARATIVE NEGLIGENCE STUDY COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. There is created the Comparative Negligence Study Commission (hereinafter "Study Commission").

Sec. 2. The purposes of this Study Commission are:

(1) to study the present negligence laws in this State;

(2) to determine the costs and effects of changing from the current system to a comparative negligence tort system;

(3) using original House Bill 821 (1979 Session) as a basis for study of revision of the current law, to determine what law should govern in negligence cases when both parties are, to some extent, negligent.

Sec. 3. On or before the first day of the 1980 Session of the General Assembly, the Study Commission shall file with the Governor and members of the General Assembly a written report summarizing the information obtained in the course of its inquiry. The report shall set forth the Study Commission's findings, conclusions, and recommendations, including suggested

legislation. If legislation is recommended, the Study Commission shall prepare and submit with its report appropriate bills.

Sec. 4. The Study Commission shall consist of 10 members. The Governor shall appoint eight members as follows: one law school professor or other educator who specializes in tort law, one superior court judge or appellate court judge or justice, one official of the North Carolina State Bar, one official of the North Carolina Bar Association, one attorney active in trial practice of negligence cases, one representative of the insurance industry and two persons not associated with the insurance industry to represent consumer interests. The Speaker of the House of Representatives shall appoint one member; and the President of the Senate shall appoint one member.

Sec. 5. If a vacancy occurs in the membership of the Study Commission, the appointing officer shall appoint a replacement who shall serve for the remainder of the term of the member whom he succeeds.

Sec. 6. The initial members of the Study Commission shall be appointed no later than July 1, 1979, and shall serve until the termination of the Study Commission. The Governor shall appoint one of the Study Commission members as its chairman.

Sec. 7. The Study Commission may solicit, employ, or contract for technical assistance and clerical assistance, and may purchase or contract for the materials and services it needs. The staff resources of the Legislative Services Commission shall be available to this Study Commission without cost to the Study

Commission except for travel, subsistence, supplies, and materials, and, subject to the approval of the Legislative Services Commission, the Study Commission may meet in the Legislative Building.

Sec. 8. Legislator members of the Study Commission shall be reimbursed for subsistence and travel expenses at the rates set out in G.S. 120-3.1.

Sec. 9. Members of the Study Commission who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5.

Sec. 10. Members of the Study Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rates set out in G.S. 138-6.

Sec. 11. There is appropriated from the General Fund to the Comparative Negligence Study Commission for fiscal year 1979-80 the sum of six thousand dollars ($6,000) to carry out the purposes of this act.

Sec. 12. This act is effective upon ratification.

Appendix D

Membership of Committee to Study the Laws of

Evidence and Comparative Negligence

Representative H. Parks Helms
Legislative Research Commission Member in Charge

Senator Henson P. Barnes, Cochairman

Mr. Ralph Stockton, Cochairman

Mr. Charles Becton

Dr. James Black

Justice Walter Brock

Dean Kenneth Broun

Professor Robert Byrd

Patricia S. Conner

Senator William G. Hancock
(Replaced Senator Willis Whichard)

Mr. Herbert Lamson, Jr.

Judge John C. Martin

Mr. McNeill Smith

Senator R. C. Soles

Senator Robert S. Swain

Mr. John D. Warlick

Appendix E

List of Speakers at Committee Meetings

Professor Walker Blakey, U.N.C. School of Law

Mr. Charles Blanchard, N. C. Academy of Trial Lawyers

Professor Jack Broderick, Campbell University School of Law

Mr. Robert Farb, The Institute of Government

Mr. Perry Henson, N. C. Association of Defense Attorneys

Ms. Edith Marsh, Government Relations Representative of Westinghouse Electric Corporation

Mr. Grady Patterson, N. C. Association of Defense Attorneys

Mr. John Sims, General Counsel for the Southern Railway Company

Mr. Norman Smith, Attorney

SESSION 19 81

INTRODUCED BY:

DRAFT
FOR REVIEW ONLY

Referred to:

A JOINT RESOLUTION AUTHORIZING THE LEGISLATIVE RESEARCH COMMISSION TO CONTINUE ITS STUDY OF THE LAWS OF EVIDENCE.

Be it resolved by the Senate, the House of Representatives concurring:

Section 1. The Legislative Research Commission may continue its study of the laws of evidence in this state, directing its efforts toward a proposed Evidence Code. The Commission may report its recommendations and any proposed legislation to the 1982 Session of the General Assembly.

Sec. 2. This resolution is effective upon ratification.

Appendix G

States Adopting Some Form of Comparative Negligence

Statutory

Type of Comparative Negligence	State	Year
Pure: Plaintiff may recover to the extent to which defendant is negligent.	Louisiana	1980
	Mississippi	1919
	New York	1975
	Rhode Island	1971
	Washington	1973
Modified I: Plaintiff may recover only if his negligence is less than that of defendant.	Arkansas	1955
	Colorado	1971
	Georgia	1855
	Hawaii	1969
	Idaho	1971
	Kansas	1974
	Maine	1965
	Massachusetts	1973
	Minnesota	1969
	Montana	1977
	North Dakota	1973
	Oklahoma	1973
	Oregon	1971
	Utah	1973
	Wyoming	1973
Modified II: Plaintiff may recover if his negligence is less than or equal to that of defendant.	Connecticut	1973
	Nevada	1973
	New Hampshire	1969
	New Jersey	1973
	Pennsylvania	1976
	Texas	1973
	Vermont	1970
	Wisconsin	1931
Modified III: Differentiates only between slight and gross negligence. Damages are apportioned only if plaintiff's negligence is slight and defendant's is gross.	Nebraska	1913
	South Dakota	1941

Judicial

Pure	Alaska	1975
	California	1975
	Florida	1973
	Michigan	1979

Questionnaire

1. Did any significant increase in insurance premiums in your state result at the time of initial adoption, or subsequent to adoption, of comparative negligence that are traceable to the use of comparative negligence rather than contributory negligence?

2. If so, what percent of increase in premiums resulted?

3. If data is not available to respond to the above questions, in your opinion what has been the impact of adoption of comparative negligence upon insurance premiums in your state? (Check the appropriate box below.)

☐ no impact

☐ slight increase

☐ moderate increase

☐ significant increase

Appendix I

Associations Contacted

George Kaveney
Insurance Information Institute
Southeastern Region
3070 Presidential Drive
Suite 239
Atlanta, Ga. 30340

David Farmer
Assistant Vice President and Regional Manager
Alliance of American Insurers
250 Piedmont Avenue
Auite 1158
Atlanta, Ga. 30308

Ray G. Farmer, Counsel
American Insurance Association
Southeast Regional Office
3445 Peachtree Road, N.E.
Atlanta, Ga. 30326

Carole Banfield
Vice President of Government and Industry Relations
Insurance Services Office
160 Water Street
New York, N. Y. 10038

Victor Levit
Long & Levit Law Offices
465 California Street
San Francisco, Calif. 94104

Leah Guerry, Executive Director
Louisiana Trial Lawyers Association
601 Spain Street
Baton Rouge, Louisiana 70802

William Trawick, Manager
Insurance Services Office of North Carolina
P. O. Box 2021
Raleigh, N. C. 27602

Robert P. Constantine, Jr.
Heyman and Sizemore Law Offices
(Provide legal services to National Association of
Independent Insurers)
1940 Equitable Building
Atlanta, Ga. 30303

STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611

December 16, 1980

TO THE MEMBERS OF THE LEGISLATIVE RESEARCH COMMISSION:

Attached is the minority report of the Study Committee on the Laws of Evidence and Comparative Negligence. At the meeting December 12, 1980, Study Committee members, Co-chairman Mr. Ralph M. Stockton, Jr., Judge John C. Martin, Mr. McNeil Smith and Mr. Herbert Lamson, Jr. expressed opposition to the Recommended Legislation to Adopt a Comparative Fault System, as set forth beginning on page 19 of the Committee Report.

Due to the shortness of time for filing, this report is not as detailed as desired by the minority. This minority report was prepared by the undersigned and concurred in by the members named above.

Respectfully submitted,

Herbert Lamson, Jr.
Committee Member

MINORITY REPORT AGAINST COMPARATIVE FAULT

While theoretically comparative fault may appear superficially more equitable and it has been recently adopted in several states, there is no conclusive evidence that the present contributory negligence system works injustice or that introducing comparative fault would be an improvement.

As to the extreme example cited, it has been our real life experience that pedestrians who are minimumly at fault when confronted by 4,000 pounds of steel automobile are regularly paid for their injuries.

The proposed bill is a radical and visionary departure from existing law and no one can predict where it will lead. The novel idea of having no set-off where there is insurance, will be particularly troublesome.

The four dissenters, all of whom are lawyers, are in total agreement that the passage of a comparative fault law will benefit lawyers. As to whether it will be of benefit to the general public, it is doubtful.

It will require years of litigation to establish what this all means, even acknowledging that it is carefully and skillfully drafted. It offers no standards whatsoever to guide the Court or the jury in deciding percentages of blame to be assigned--leaving such decisions to whim alone.

If the jury cannot decide which is the more negligent, they may well find each equally at fault which, under the proposed bill, would result in payment of damages to both parties.

It will be almost impossible for a judge to charge a jury on how to measure the percentage of fault attributable to each party.

Should, for example, speeding be 20% more blameworthy than running a stop sign? Does driving after license revoked make someone 20% negligent or 80%? Should the violation of a traffic law be considered more negligence percentagewise than a careless act which no statute prohibits?

In effect, the proposed bill substitutes the unknown and unforeseeable against an existing system which is both well known and well understood.

J. Robert Elster, an opponent of comparative negligence who spoke to the 1980 Annual Meeting of the North Carolina Bar Association, is quoted in BAR NOTES, Volume 31, No. 3, page 32;

> "Remember that under our present system contributory negligence is a bar only when it is found by the greater weight of the evidence, with the burden of proof being on the defending party, that the claimants own conduct was one of the proximate causes of his own injury. Remember that a "proximate cause" is "a cause without which the event would not have occurred." In other words, for contributory negligence to constitute a bar to a claim it must be found that the conduct of the claimant constituting his contributory negligence--whether 10% or 90% of the total negligence of all parties--was conduct without which his injury would not have occurred.
>
> Now if you believe that society is better served by a system which compensates us all for injury or damage even when our own conduct contributed to the injury or damage, then what you really want is "no fault" insurance, not comparative negligence. I happen to also be opposed to the concept of "no fault" insurance. But at least that proposition faces the issue honestly rather than mixing the apples of principles of social conduct with the oranges of insurance compensation."

North Carolina is progressive but conservative. Its people know instinctively what is right and what is wrong and they don't expect to get something for nothing.

They also know "if it ain't broke, you don't fix it."